91-502

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PATRICIA M. ECKERT, G. MITCHELL WILK, JOHN B. OHANIAN, DANIEL WM. FESSLER, NORMAN D. SHUMWAY, NEAL J. SHULMAN, and WILLIAM R. SCHULTE,
Petitioners,

vs.

FEDERAL EXPRESS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETER ARTH, JR.
EDWARD W. O'NEILL
JAMES T. QUINN
MARK FOGELMAN
COUNSEL OF RECORD
Public Utilities Commission
of the State of California
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-1992
Counsel for Petitioners

September 23, 1991

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

Whether the Airline Deregulation Act of 1978, as amended, 49 U.S.C. App. § 1305(a)(1), which prohibits state regulation "relating to rates, routes, or services of any air carrier having authority . . . to provide air transportation," preempts the State of California from engaging in the economic regulation of Federal Express Corporation's purely intrastate transportation of packages that are transported exclusively by truck and at no time by air.

PARTIES

Appellant in the United States Court of Appeals for the Ninth Circuit was Federal Express Corporation.

Appellees were the Public Utilities Commission of the State of California ("CPUC") and, in their official capacities, Stanley W. Hulett, Donald Vial, Frederick R. Duda, John B. Ohanian, and G. Mitchell Wilk, Commissioners of the CPUC, Victor Weisser, Executive Director of the CPUC, and Norman Kelley, Director of the Transportation Division of the CPUC.

In accordance with Fed.R.Civ.P. 25(d), Fed.R.App.P. 43(c)(1) and U.S.S.Ct. R. 35.3, the names of the successors to those officials who no longer hold office have been substituted in the caption.

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The Public Utilities Commission of the State of California, its Commissioners, its Executive Director and the Director of its Transportation Division (hereinafter collectively "CPUC" or "California") respectfully petition that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on June 25, 1991.

OPINIONS BELOW

The majority and dissenting opinions of the Ninth Circuit are reported at *Federal Express Corp. v. Pub. Util. Comm'n of California,* 936 F.2d 1075 (9th Cir. 1991), and are reproduced in

the Appendix, A1-12.[1] The opinions of the District Court are reported at *Federal Express Corp. v. Pub. Util. Comm'n of California*, 716 F.Supp 1299 (N.D.Cal. 1989), and *Federal Express Corp. v. Pub. Util. Comm'n of California*, 723 F.Supp 1379 (N.D.Cal. 1989), and are reproduced in the Appendix, B1-13 and C1-10, respectively.

JURISDICTION

The judgment of the Ninth Circuit was entered on June 25, 1991, with a dissenting opinion filed on June 27, 1991. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, U.S. Const., Art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Airline Deregulation Act of 1978, as amended, 49 U.S.C. App. § 1305(a)(1), provides:

> Except as provided in paragraph (2) of this subsection [which is not applicable here], no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

Other relevant constitutional and statutory provisions and regulations are set forth in Appendix, D1-E201.

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[1] As herein used, numerals preceded by letters refer to page numbers in the appendix to this petition.

STATEMENT OF THE CASE

Federal Express Corporation ("Federal Express"), a nationwide air package express delivery service, is one of the largest trucking companies in the State of California. It operates its air transportation business pursuant to a grant of authority under the Federal Aviation Act, 49 U.S.C. App. § 1371. It is therefore an "air carrier having authority . . . to provide air transportation" within the meaning of 49 U.S.C. App. § 1305(a)(1)—at least with respect to its air transportation activities.

A significant portion of Federal Express's business, however, involves the transportation of packages originating at and destined for locations within California which move solely by truck and neither leave the state nor see the inside of an airplane. It is this portion of Federal Express's business that is involved in this case.

Federal Express's California ground fleet consists of more than 2,600 trucks, vans and tractor-trailers. It operates 39 motor carrier repair and maintenance shops throughout the state, and its vehicles are also repaired and maintained at ten truck service centers operated by independent contractors. F5. Federal Express's intrastate motor carrier operations in California are substantial, and each year the company delivers hundreds of thousands of purely intrastate California packages which move exclusively by truck. F6. In conducting its intrastate trucking business, Federal Express competes directly with numerous other intrastate motor carriers which are subject to state regulation.

Federal Express's company policy encourages the exclusive use of the less costly truck transportation mode over air transportation whenever feasible. Thus package sorters in Los Angeles and the San Francisco Bay Area are instructed to segregate and set aside packages for regional delivery solely by truck, *e.g.*, in the Los Angeles Basin or between Oakland, Federal Express's western hub, and other Northern California cities such as Santa Rosa, Sacramento, San Jose and San Francisco. F6; F4. Additionally, five large Federal Express trucks transport packages, many of which are purely intrastate in character, between California's two principal population centers—Los Angeles and the San Francisco Bay Area—on a daily basis pursuant to a fixed schedule. F2-3.

Packages for second-day delivery are also transported entirely on the ground. F3. Recently, Federal Express announced its intention to expand its California intrastate trucking business from small packages to freight shipments of any size or weight. *See* Note 7, *infra*.

The CPUC is a state agency established pursuant to the Constitution and Laws of the State of California. Cal. Const., Art. XII, §§ 1-9. It is responsible for regulating various aspects of the intrastate motor carrier transportation of packages, freight and property, including licensing, insurance, rates and safety. Cal. Const., Art. XII, § 4; Cal. Pub. Util. Code §§ 1062, 3502.[2] Its flexible and pro-competitive economic regulatory program is a model for other states. *See Re Regulation of General Freight Transportation by Truck*, 33 Cal. P.U.C.2d 333 (1989), *modified*, 35 Cal.P.U.C.2d 307, (1990); E1-201. Three primary goals of the CPUC's regulatory program are to promote fair competition among intrastate motor carriers, to prohibit discrimination and to ensure public safety. E45. To support its statewide regulatory and safety program for trucks, the CPUC imposes quarterly fees on carriers based upon their California gross operating receipts. Cal. Pub. Util. Code § 5003.1. More than 20,000 intrastate motor carriers in California pay such fees. F12-16.

The CPUC has regulated the portion of Federal Express's business which is conducted purely intrastate and solely by truck long after the enactment of the Airline Deregulation Act. Since 1984, Federal Express has held commercial trucking licenses from the CPUC.[3] Consistent with its flexible rate and liberal variance policies, the CPUC has granted Federal Express permis-

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[2] As indicated by the Ninth Circuit, 936 F.2d at 1078; A5, this case does not place in issue the CPUC's authority to regulate safety. The CPUC interprets the Ninth Circuit's decision as allowing it to grant operating authority, to adopt safety regulations including the specification of driver, equipment-listing, inspection, insurance and other safety-related requirements, to revoke operating authority for violation, and to collect fees to underwrite its safety program.

[3] Federal Express possesses two types of authority from the CPUC—a highway common carrier certificate registered to a wholly-owned subsid-

sion to charge the same rates for its intrastate ground movements as it charges for its interstate air movements. F7-9; F11-12. From 1985 to 1987, the company remitted quarterly fees to the CPUC based on estimates of gross operating revenues from its truck-only California intrastate traffic. *Id.* Such payments have been held in abeyance during the pendency of this action.

On September 23, 1987, Federal Express filed suit in the United States District Court for the Northern District of California under 28 U.S.C. §§ 1331, 1332, 1337, 2201 and 2202, seeking injunctive and declaratory relief from the CPUC's economic regulation of its truck-only intrastate motor carrier operations. It alleged that the CPUC's regulation was preempted by 49 U.S.C. App. § 1305(a)(1) and must therefore fall under the Supremacy Clause (U.S. Const., Art. VI, cl. 2). It also alleged that the CPUC's regulation constituted an impermissible burden on interstate commerce under the Commerce Clause (U.S. Const., Art. I, § 8, cl. 3).

On cross-motions for summary judgment, the CPUC prevailed on both the preemption claim (*Federal Express Corp. v. Pub. Util. Comm'n of California*, 716 F.2d 1299 (N.D.Cal. 1989)) and the Commerce Clause claim (*Federal Express Corp. v. Pub. Util. Comm'n of California*, 723 F.2d 1379 (N.D.Cal. 1989)).

On June 25, 1991, the United States Court of Appeals for the Ninth Circuit ruled in a split decision that California's economic regulation of Federal Express's purely intrastate trucking operations is preempted under § 1305(a)(1) and reversed the judgment of the District Court. *Federal Express Corp. v. Pub. Util. Comm'n of California*, 936 F.2d 1075 (9th Cir. 1991).

This petition follows.

REASONS FOR ALLOWANCE OF THE WRIT

The Ninth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. The Ninth Circuit has concluded that the Airline Deregulation Act of

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iary, Federal Express Logistics, Inc., and a highway contract carrier permit registered to Federal Express Corporation. F5.

1978, as amended, 49 U.S.C. App. § 1305(a)(1), preempts all state economic regulation of the "rates, routes, or services of any air carrier," whether or not those "rates, routes, or services" have anything to do with the provision of air transportation. Under the Ninth Circuit's rationale, once a party becomes an "air carrier" within the meaning of § 1305(a)(1), its activities having little or no relationship to air transportation become immune from state economic regulation.[4]

California, on the other hand, contends that the phrase "rates, routes, or services of any air carrier" refers solely to activities related to the provision of air transportation. Based on California's concessions that it will not regulate movements which either leave the state or are conducted wholly or partly by airplane, the dissent characterizes this as "an easy case" in California's favor. 936 F.2d at 1080; A8. To date, the Court has not considered the preemptive reach of § 1305(a)(1).[5]

The Ninth Circuit's facial invalidation of California's economic regulation of Federal Express's intrastate trucking operations seriously misconstrues both the Congressional intent underlying

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[4] As noted by the dissent below, "if Federal Express diversifies into the florist or pizza business in San Francisco and uses its fleet of trucks to deliver flowers or pizza in the Bay Area, presumably the selling of flowers or pizza become activities preempted from state regulation whether airplanes play any part in the delivery or not. I cannot accept this argument. . ." 936 F.2d at 1080-81; A10.

[5] The Court has invited the Solicitor General to express the views of the United States in *Morales v. Trans World Airlines* and *Attorney General of California v. Trans World Airlines*, Nos. 90-1604 and 90-1606, which seek review of the Fifth Circuit's determination that § 1305(a)(1) preempts the enforcement of state laws relating to the false advertising of air fares. *See* Order dated June 10, 1991. The preemption question in those cases is distinct from that presented here. Moreover, the regulation preempted here is far more attenuated from the "rates, routes, or services of any air carrier" than in those cases, and the Ninth Circuit's conclusion has a potentially far broader impact on state regulation since it would preempt state economic regulation of virtually *all* activities of air carriers, whether or not they relate to the provision of air transportation.

the Airline Deregulation Act and this Court's preemption decisions. It directly undermines the ability of California and other states to ensure fair competition and non-discrimination among motor carriers engaging in intrastate trucking activities and simultaneously threatens the ability of the states to protect public safety. Finally, it provides no workable standard for determining the extent to which a particular state regulatory scheme is preempted, thereby inviting years of burdensome litigation across the country between individual states and individual trucking companies.

The Ninth Circuit's decision will seriously impact thousands of trucking companies and their employees, state regulatory commissions and highway traffic enforcement authorities in each of the fifty states, the consumers, senders and recipients of goods or packages delivered by truck, and drivers and passengers on the nation's highways.

For these reasons, the writ should issue.

I

THE NINTH CIRCUIT'S CONCLUSION THAT § 1305(a)(1) PREEMPTS CALIFORNIA'S ECONOMIC REGULATION OF FEDERAL EXPRESS'S OPERATIONS WHICH ARE CONDUCTED SOLELY INTRASTATE AND EXCLUSIVELY BY TRUCK CONFLICTS WITH THE INTENT OF CONGRESS AND THE PREEMPTION DECISIONS OF THIS COURT

Contrary to the conclusion of the Ninth Circuit, § 1305(a)(1) does not preempt California's economic regulation of Federal Express's intrastate motor carrier operations "either explicitly, implicitly, or by virtue of an actual conflict." *Wisconsin Public Intervenor v. Mortier,* 111 S.Ct. 2476, 2482 (June 21, 1991). Acknowledging that "common sense and common practice have forbidden that [§ 1305(a)(1)] be taken literally and have restricted its range," 936 F.2d at 1078; A5, *citing Air Transport Ass'n v. Pub. Util. Comm'n of California,* 833 F.2d 200, 207 (9th Cir. 1987), *cert denied,* 487 U.S. 1236 (1988), the Ninth Circuit majority nevertheless fails to give due weight to the fundamental

presumption "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Mortier, supra,* 111 S.Ct. at 2482, *quoting Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). *See also Pacific Gas & Elec. Co. v. Energy Resources Comm'n of California,* 461 U.S. 190, 205-6 (1983).

As is made abundantly clear by the District Court, 716 F.Supp. at 1302-5; B5-11, and the dissent, 936 F.2d at 1079-81; A7-12, the most plausible reading of the plain words of the statute is that § 1305(a)(1) only preempts state regulation of rates, routes, or services pertaining to *air transportation.* A contrary construction would mean that "virtually any carrier-owned or operated service would escape state regulation if it established the slightest nexus between its various activities." 716 F.Supp. at 1303; B7 (footnote omitted). Notably, the District Court found that "[a]lthough Federal Express's ground operations are commercially linked to its air transportation system, its hauling operations are not substantially different from services provided by other motor carriers." *Id.* Federal preemption of state economic regulation of Federal Express's intrastate motor carrier operations is thus not the "clear and manifest purpose of Congress." *Mortier, supra,* 111 S.Ct. at 2482.[6]

The Court of Appeals decisions applying § 1305(a)(1) uniformly hold that the statute's preemptive effect only extends to the *air* rates, routes, and services of air carriers. *Hingson v. Pacific Southwest Airlines,* 743 F.2d 1408, 1415 (9th Cir. 1984) (regulation of air carrier seating policies for handicapped passengers relates to air services); *Anderson v. USAIR,* 818 F.2d 49, 57 (D.C. Cir. 1987) (same); *Illinois Corporate Travel v. American Airlines,* 889 F.2d 751, 754 (7th Cir. 1989), *cert. denied,* 110 S.Ct. 1948 (1990) (prohibition of certain advertising concerning airfares relates to air rates); *New England Legal Foundation v. Massachusetts Port Auth.,* 883 F.2d 157, 173-75 (1st Cir. 1989)

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[6] *See also* Jordan & Hoffman, *Federal Preemption of State Laws Regulating For-Hire Motor Carriers Transporting Property (Including Baggage) as Part of an Intrastate Air/Truck Shipment,* 19 Transp. L.J. 335, 344-55 (1991).

(aircraft landing fee regulations relate to air service); *O'Carroll v. American Airlines*, 863 F.2d 11, 13 (5th Cir.), *cert. denied*, 490 U.S. 1106 (1989) (state law claims by passenger for wrongful exclusion from airline flight relate to air service); *Trans World Airlines v. Mattox*, 897 F.2d 773, 780-83 (5th Cir.), *cert. denied*, 111 S.Ct. 307 (1990), *cert. pending*, Nos. 90-1604 and 90-1606 (*see* Note 5, *supra*) (state laws proscribing deceptive advertising of airfares relates to air rates). Each of these cases shows that § 1305(a)(1) preemption has been applied where the state law or regulation clearly relates to the rates or service of the *air operations* of an air carrier.

On the other hand, the Court of Appeals decisions have not found air carrier operations that are not singularly *air transportation* operations immune from state regulation. In *Air Transport Ass'n, supra*, 833 F.2d 200, an association of airlines challenged a CPUC regulation that prohibited eavesdropping on telephone calls without providing notice to the conversing parties. The airlines monitored conversations between their reservation agents and members of the public. The Ninth Circuit held that California's prohibition of undisclosed telephone monitoring by the airlines did not relate directly or indirectly to the rates, routes, or services of an airline. The Court noted that there was nothing in the Federal Aviation Act or its history indicating that Congress intended to preempt all state regulation which affects airlines. *Id.* at 207. Similarly, in *West v. Northwest Airlines*, 923 F.2d 657 (9th Cir. 1990), the Ninth Circuit held in part that § 1305(a)(1) does not preempt state compensatory damages remedies for airline overbooking. The Court concluded that "state laws that merely have an *effect* on airline services are not preempted." *Id.* at 660 (emphasis in original).

California's position is also supported both by other provisions of the Airline Deregulation Act and the Act's legislative history. While the Act's definitions of "interstate air transportation" and "interstate air commerce" comprehend the movement of commerce "partly by aircraft and partly by other forms of transportation," 49 U.S.C. App. §§ 1301(23) and 1301(24), these definitions do not support the Ninth Circuit's conclusion. California does not seek to regulate packages which have moved or will

move by air. *See* 936 F.2d at 1080; A9; 716 F.Supp. at 1304; B8. Moreover, the fact that "air transportation" is defined as including commerce "partly by aircraft and partly by other forms of transportation" strongly suggests, under the principle of *inclusio unius exclusio alterius*, that movements only by "other forms of transportation" are not covered by the Act.

Similarly, the legislative history of § 1305(a)(1) is bereft of any reference to ground transportation. *See* H.Rep. No. 95-1211, 95th Cong., 2nd Sess. 15-16, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3737, 3751-52; H.Conf.Rep. No. 95-1779, 95th Cong., 2nd Sess. 94-95, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3773, 3804-5. The same is true of the legislative history of the 1984 amendments to § 1305(a)(1). *See* H.Rep No. 98-793, 98th Cong., 2nd Sess. 1-17, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2857, 2857-2873; H.Conf.Rep. No. 98-1025, 98th Cong., 2nd Sess. 13-21, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2874, 2874-2882. The whole focus of the Airline Deregulation Act was to preclude the states from regulating air services and air transportation, *Hughes Air Corp. v. Pub. Util. Comm'n of California*, 644 F.2d 1334, 1336-37 (9th Cir. 1981), not intrastate truck transportation.

California's position is also supported by the federal statutes governing the regulation of motor carriers. Numerous post-1978 amendments to the Interstate Commerce Act, 49 U.S.C. §§ 10101, *et seq.*, have left state economic regulation of intrastate motor carriage undisturbed. One such provision, 49 U.S.C. § 10521(b)(1), provides in pertinent part that nothing in the Act is to "affect the power of a state to regulate intrastate transportation provided by a motor carrier." A second provision, 49 U.S.C. § 10521(b)(2), leaves to the states the authority to regulate the rates of "intrastate transportation provided by a motor carrier." A third provision, 49 U.S.C. § 10521(b)(3), leaves intact state authority to "allow a motor carrier to provide intrastate transportation on the highways of a State." And a fourth provision, 49 U.S.C. § 10521(b)(4), leaves undisturbed "the taxation power of a State over a motor carrier."

In addition, the Interstate Commerce Act delineates those situations in which interstate motor carriage is so closely an

adjunct of air transportation that it becomes exempt from federal motor carrier regulation. *See* 49 U.S.C. §§ 10526(a)(8)(B) (exempting the transportation of property transported by motor vehicle and, as part of a continuous movement, transported by air), 10526(a)(8)(C) (exempting transportation by motor vehicle in lieu of by air under emergency conditions). As noted by the District Court, these provisions "suggest that Congress viewed ground and air transportation as belonging to two different regulatory regimes under normal circumstances." 716 F.Supp. at 1305; B10.

The Ninth Circuit makes much of the commingling of "interstate" packages and "intrastate" packages in Federal Express's trucks. It observes that "[e]very truck carries packages that are in interstate commerce by air." 936 F.2d at 1078; A5. But 49 U.S.C. § 10528, which provides that the existence of "mixed" truck loads "shall not affect the unregulated status of [the] exempt property or the regulated status of the property which the carrier is authorized to transport under [its] certificate or permit," strongly suggests that the majority's observation is without significance. Moreover, this Court has upheld dual state-federal regulation of the rates, services and facilities of telephone companies when to do so affirms the will of Congress. *See Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 373-76 (1986). *See also* dissent, 936 F.2d at 1080 n. 4; A9.

Finally, it must be noted that Federal Express's preemption claim is essentially a facial challenge to the CPUC's economic regulation. The CPUC's economic regulatory program includes provision for the authorization of variances, and the CPUC has consistently maintained that Federal Express will be accorded such variances from any economic regulatory requirements which unduly burden its operations. E177, E195, F6-7, F10-12. Nonetheless, because Federal Express has failed to seek such variances, it is not known "how California actually applies its regulatory system to Federal Express's business." 936 F.2d at 1081; A12; *see also* 723 F.Supp. at 1383; C7. Under the circumstances of this purely facial challenge, Federal Express must show that there is no possible set of regulatory requirements the CPUC could impose upon it that would not conflict with federal law—

i.e., that "any state [economic regulation] is *per se* preempted." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 579-80 (1987). This it cannot do.

The Airline Deregulation Act does not preempt California's economic regulation of Federal Express's intrastate trucking operations either expressly, impliedly or by virtue of a conflict.

II

THE NINTH CIRCUIT'S DECISION UNDERMINES CALIFORNIA'S ABILITY TO ENSURE FAIR COMPETITION AND TO PROHIBIT DISCRIMINATION AMONG MOTOR CARRIERS ENGAGING IN INTRASTATE TRUCKING ACTIVITIES AND THREATENS CALIFORNIA'S ABILITY TO PROTECT PUBLIC SAFETY

California has adopted a system of pro-competitive, flexible and adaptive economic regulation in place of traditional cost-of-service regulation for common and contract carriers in the intrastate freight trucking industry. *See generally General Freight, supra,* 33 Cal.P.U.C.2d 333 (1989), *modified,* 35 CAl.P.U.C.2d 307 (1990); App. E1-205. The CPUC's program allows the efficiencies of the marketplace to determine transportation rates subject to certain safeguards, including some limitations on common carrier rates, a program for monitoring competitive conditions, a minimum level of service for common carriers, a requirement that all rates and associated discounts be filed and available for public inspection, and a toll-free telephone number for verifying carrier operating authority. E10. The Ninth Circuit's decision invalidating the CPUC's flexible regime of economic regulation as to Federal Express thwarts the CPUC's policies of preventing rate discrimination, assuring safe and reliable service, and fostering an environment of fair and workable competition among intrastate carriers.

As noted by the dissent, 936 F.2d at 1081; A11, and the District Court, 723 F.Supp. at 1383; C7, the preemption ratified by the Ninth Circuit's decision singles out Federal Express for more favorable treatment than that accorded other motor carriers engaged in intrastate trucking operations in California. As a

result, the Ninth Circuit's "decision will free the trucking business of Federal Express from any state economic regulation [and] will open the door for substantial increases in Federal Express's trucking business and give it a substantial competitive advantage over trucking companies that must comply with state regulation." 936 F.2d at 1081; A11.[7]

This anticompetitive impact undermines the regulatory goals of California's pro-competitive program—the assurance of fair competition and the effective elimination of discriminatory practices. Under the Ninth Circuit's decision, Federal Express will be able to evade the CPUC's tariff requirements, thereby facilitating its skimming the cream from the market by making private undisclosed agreements with specially targeted customers. It will be able to change its rates without public notice, thus enabling it to give preferences to some shippers and not to others. And it will be excused from paying its share of at least that portion of the fees which relates to and supports the state's economic regulatory program.

In addition, while the Ninth Circuit holds Federal Express to its concession that it is not challenging the CPUC's regulation of trucking safety, the logic of the majority's position threatens California and other states with a significant erosion of their ability to protect public safety. The Ninth Circuit concludes, for example, that Federal Express's "terms of service" are immune from state regulation because "[t]o regulate them is to affect the price." 936 F.2d at 1078; A6. The same could be said of safety regulation. Again, as noted by the District Court, under the interpretation of the statue urged by Federal Express, "virtually any air carrier-owned or operated service would escape state regulation if it established the slightest nexus between its various activities." 716 F.Supp. at 1303; B7.

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[7] Federal Express has announced its intention to expand its trucking operations from packages to general freight with its new Heavyweight Service designed to deliver shipments of any size or weight by the morning of the second day. The Los Angeles-San Francisco corridor is apparently targeted for this service. *See* Go-West Magazine, Apr., 1991, p. 36; Transport Topics, Apr. 15, 1991, p. 3.

III

THE NINTH CIRCUIT'S DECISION CREATES SUBSTANTIAL UNCERTAINTY AND CONFUSION AND INVITES ENDLESS LITIGATION

The Ninth Circuit's decision creates a fundamentally unworkable rule which invites widespread confusion and endless litigation. It provides no standard for ascertaining when an air carrier's ground transportation loses its immunity from state economic regulation. As noted by the dissent:

> The majority really does not set out a rationale for determining when an air carrier's ground transportation loses its quality as air transportation. The majority decision could be read as exempting any transportation services Federal Express wishes to provide. The majority does not tell us how many airplanes Federal Express must fly to Sacramento each month, in order to insulate daily truck traffic between Oakland and Sacramento from state regulation. Will one Cessna 208 carrying three packages between Oakland and Sacramento authorize Federal Express to send a dozen trucks packed with goods between the two cities free of state regulation? . . . In my view, we should apply the plain language of the statute.

936 F.2d at 1081; A11 (footnote omitted).

In addition, it provides no clear standard for ascertaining when preempted economic regulation becomes permitted non-economic regulation, *see* 936 F.2d at 1081 n. 4; A9, thereby raising the question of which provisions in the motor carrier regulatory schemes of the fifty states are preempted and which are not. And it also provides no clear basis for ascertaining who is immune from state regulation, thus raising the spectre of motor carriers which conduct most or all of their business solely by truck seeking air carrier certificates under 49 U.S.C. App. § 1371 to obtain immunity from state regulation of their trucking operations. In sum, the Ninth Circuit's resolution of the issue engenders great uncertainty and invites endless litigation between individual states and individual companies. As observed by the dissent,

> This approach is flawed in my view because it does not guide the trial bench and the bar in deciding other cases. My proposed resolution has the advantage of providing a bright line rule.

936 F.2d at 1801 n. 6; A10.

CONCLUSION

California respectfully requests that the Court issue a writ of certiorari to review the judgment of the Ninth Circuit.

Respectfully submitted,

PETER ARTH, JR.
EDWARD W. O'NEILL
JAMES T. QUINN
MARK FOGELMAN
COUNSEL OF RECORD
Public Utilities Commission
of the State of California
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-1992
Counsel for Petitioners

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